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No. 84-997 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT LAHODNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars the continuing criminal enterprise charge in this case on the ground that petitioner had previously pleaded guilty to related drug offenses, where the CCE charge could not have been included in the prior indictment and petitioner insisted on entering his guilty plea despite the government's request for a one-week continuance that would have allowed all of the charges to be resolved in one proceeding.

2. Whether the district court erred in declining to conduct a formal evidentiary hearing, including discovery and the presentation and cross-examination of witnesses, on petitioner's double jeopardy claim.

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A4-A8) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A4) was entered on August 8, 1984. A petition for rehearing was denied on November 9, 1984. The petition for a writ of certiorari was filed on December 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this case petitioner is charged with, inter alia, engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. The district court denied petitioner's pre-trial motion to dismiss the CCE count on double jeopardy grounds, and, on petitioner's interlocutory appeal, the court of appeals affirmed (Pet. App. A4-A8).

1. In December 1977, an eight-count indictment returned in the Southern District of California charged petitioner with, among other offenses, conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 and 963. Pursuant to a plea agreement, petitioner pleaded guilty to a superseding information charging him with possession of marijuana, in violation of 21 U.S.C. 844. He was sentenced to a term of five years' probation and a fine of $500. Following petitioner's plea, the original indictment was dismissed as to him.

In November 1981, petitioner was arrested while in the company of fugitives from the 1977 indictment. After a hearing, the district court revoked petitioner's probation and sentenced him to one year's imprisonment.

On August 3, 1982, petitioner was indicted in the Southern District of California for conspiracy to possess more than 1000 pounds of marijuana with intent to distribute it, conspiracy to import marijuana, and possession of 3000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), 846, and 963. In September 1982, petitioner moved to dismiss the two conspiracy counts on the ground that they involved the same conspiracies that had been charged in the 1977 indictment and therefore were barred by the Double Jeopardy Clause. The district court denied this motion on October 26, 1982, and petitioner filed a notice of appeal on November 2.

In addition, on October 26, 1982, the United States Attorney made a written request to the Department of Justice, pursuant to departmental requirements (see U.S. Dep't of Justice, *United States Attorney's Manual* § 9-100.280, at 39 (Mar. 9, 1984)), for authority to bring a CCE charge against petitioner. This request was based in part on information that the government had obtained in September and October of 1982 from co-defendant Louis

Villar, who had agreed to cooperate with the prosecution in order to receive a reduced sentence. The Department granted the United States Attorney's request to proceed on November 4, 1982.

Petitioner's appeal from the denial of his motion to dismiss was scheduled for oral argument in the court of appeals on April 6, 1983. However, on April 5, petitioner submitted an ex parte emergency motion to dismiss the appeal and to order the mandate to be issued forthwith. This motion was granted on April 5. Petitioner's counsel then notified the Assistant United States Attorney that the appeal had been dismissed and that petitioner intended to plead guilty to the pending charges. The Assistant United States Attorney informed counsel of the government's intention to pursue the CCE charge.

On April 6, petitioner sought to plead guilty to the three conspiracy and possession counts in the 1982 indictment. The government objected and requested a continuance of one week in order to obtain a superseding indictment that would add a CCE charge. Petitioner responded that he was there to plead guilty and wished to enter a plea to all charges (Tr. 194). The government's request for a continuance was denied, and petitioner pleaded guilty to the conspiracy and possession counts. Petitioner was eventually sentenced to a term of four years' imprisonment.

2. In August 1983, a grand jury in the Southern District of California returned a multiple-count indictment against petitioner. Count 13 of the indictment charged petitioner with engaging in a continuing criminal enterprise. As the predicate "continuing series of violations" for the CCE count (see 21 U.S.C. 848(b)(2)), the indictment alleged 14 substantive drug offenses, including the possession offense charged in the 1982 indictment; no drug conspiracy was included as a predicate offense.

In September 1983, petitioner moved to dismiss the CCE count on grounds of double jeopardy in light of his guilty plea to the 1982 indictment. In addition, petitioner served ten subpoenas on the United States Attorney, several Assistant United States Attorneys and DEA agents, and others.

On October 14, 1983, the district court took evidence and heard argument on petitioner's motion to dismiss the CCE count. The district court also quashed the defense subpoenas. On November 7, the court denied petitioner's double jeopardy motion on two grounds (Tr. 189-208).

First, relying on *Brown* v. *Ohio*, 432 U.S. 161, 169 n.7 (1977), the district court found that at the time of the 1982 indictment the government, despite the exercise of due diligence, did not have sufficient evidence to prosecute petitioner for CCE. Indeed, the court specifically stated that the government's case would have been insufficient to avoid a motion for judgment of acquittal under Fed. R. Crim. P. 29 based on lack of evidence (Tr. 40-42, 68, 191-192). However, by November 1982, after the United States Attorney had obtained additional information from Villar and had received the necessary authority to proceed from the Department of Justice, the government had adequate evidence to pursue the CCE prosecution (Tr. 191-202). These determinations were based both on the record in this case and in petitioner's 1977 and 1982 cases[1] and on the court's experience in presiding over two trials involving petitioner's co-conspirators (Tr. 11-12).

Second, relying on *Jeffers* v. *United States*, 432 U.S. 137 (1977), the district court also held that petitioner had waived his right against double jeopardy (Tr. 205-208):

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[1]At the request of the parties, the records in the preceding prosecutions were incorporated by reference in this case for purposes of petitioner's motion to dismiss (Tr. 187).

> By the ex parte and sudden and unexpected withdrawal of his interlocutory appeal the day before oral argument, and by having the mandate hand-carried to the Court the next day and requesting his right to plead guilty, even though the Government sought a one-week continuance in order to obtain the superseding indictment, [petitioner] took the prosecution by surprise and gave up his claim to have both the continuing criminal enterprise count and the conspiracy counts heard by the same trier of fact in the same trial.
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> * * * * *
>
> By requesting to proceed with his change of plea of guilty [petitioner], in effect, opposed the Government's request for a one-week continuance so that [he] could be tried for both the continuing criminal enterprise count and the conspiracy counts at one time.
>
> Thus, [as in *Jeffers*, a] defendant who makes tactical decisions which result in a charge for a greater offense necessarily being prosecuted separately from the lesser offense may not hide behind the screen of double jeopardy to claim Government oppression.

Finding that petitioner had been "well aware of the Government's intent to seek a continuing criminal enterprise indictment" and that the government's actions "were not only reasonable but responsible," the court concluded that petitioner's "strategic[] choice" constituted a waiver of double jeopardy (*ibid.*).

3. On petitioner's interlocutory appeal, the court of appeals affirmed in an unpublished memorandum decision (Pet. App. A4-A8). The court of appeals noted that the district court "was intimately familiar with the case, having presided over a number of earlier proceedings" (*id.* at A7), and it sustained the district court's findings that "[t]he

government acted with due diligence in discovering evidence on [the CCE charge] but was delayed in instituting the charge by [petitioner's] own actions" (*id.* at A8). Because petitioner's "actions prevented the government from trying the conspiracy and continuing criminal enterprise charges together," and because there was no "prosecutorial or judicial overreaching" (*ibid.*), the court held that double jeopardy did not bar the CCE count in this case.

ARGUMENT

Petitioner contends that the Double Jeopardy Clause bars the present CCE charge in light of his guilty plea to the substantive and conspiracy offenses in the 1982 indictment. This contention does not warrant further review.

1. Noting that the issue is currently before the Court in *Garrett* v. *United States*, No. 83-1842 (argued Jan. 16, 1985), petitioner asserts (Pet. 12) that successive prosecutions are impermissible for CCE and a substantive drug crime that serves as a predicate for the CCE offense. However, as we explain in our brief in *Garrett* (at 5, 13-14),[2] this argument, even if correct, would not preclude the CCE prosecution altogether but instead would require at most a limitation on the use that could be made in the CCE trial of the evidence concerning that substantive predicate offense; provided that such evidence is introduced for purposes other than to establish the necessary series of violations, no double jeopardy issue would arise. Here, petitioner has not yet been tried on the 1983 indictment, and the CCE count rests on 13 substantive predicate offenses in addition to the possession of marijuana that was charged in the 1982 indictment to which petitioner pleaded guilty. Accordingly, his double jeopardy claim will be directly affected — and perhaps eliminated entirely — by the further proceedings to

[2]A copy of our brief in *Garrett* is being sent to counsel for petitioner.

be held in the district court. In these circumstances, it would be premature for the Court at this stage to consider petitioner's argument, which, while premised on principles of double jeopardy, essentially seeks an anticipatory ruling on the uses to which certain government evidence may be put at trial. Indeed, a "double jeopardy" claim of this nature, because it does not affect the government's right to try petitioner, is not appealable prior to trial under *Abney* v. *United States*, 431 U.S. 651 (1977).[3]

2. In any event, there is no merit to petitioner's double jeopardy claims. Even assuming, as he urges (Pet. 12-13), that successive prosecutions may not ordinarily be brought for CCE and substantive predicate offenses (see *Garrett* v. *United States, supra*) or for CCE and an interrelated drug conspiracy (see *Jeffers* v. *United States*, 432 U.S. 137, 147-151 (1977) (plurality opinion)), the Double Jeopardy Clause would not bar the CCE charge in this case.

First, as this Court has recognized (see U.S. *Garrett* Br. 42-43), the Constitution does not prohibit successive prosecutions where the government "is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge * * * have not been discovered despite the exercise of due diligence." *Brown* v. *Ohio*, 432 U.S. 161, 169 n.7 (1977). Both courts below correctly concluded that this case falls within the "due diligence" exception.[4] When the August 1982 indictment

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[3]We are also advised that petitioner did not raise the *Garrett* issue in the courts below but rather argued solely that the CCE count was barred by his guilty plea to the conspiracy counts in the 1982 indictment. Thus, it appears that petitioner failed to preserve for review the question of the relation between CCE and substantive predicate offenses.

[4]We note that the Court has recently declined to review another decision of the Ninth Circuit involving the "due diligence" exception. See *United States* v. *Stearns*, 707 F.2d 391 (1983), certs. denied, Nos. 83-5511 & 83-5565 (Jan. 9, 1984).

was returned against petitioner, a CCE count could not have been included. Rather, it was not until the United States Attorney obtained information from a cooperating co-conspirator in September and October 1982, and based on that information received the necessary approval to proceed from the Department of Justice in November 1982, that the government was able to bring the CCE charge.[5] Thus, even if petitioner had pleaded guilty to the 1982 indictment at the time it was returned, that would not have prevented the subsequent CCE prosecution.

Beyond that, however, petitioner did not plead guilty to the 1982 indictment until April 1983, and in entering his plea petitioner successfully thwarted the government's efforts to resolve in one proceeding both the 1982 charges and the CCE charge. After hastily securing the dismissal of his pending appeal, petitioner insisted that he be immediately allowed to plead guilty to the 1982 indictment notwithstanding the government's request for a continuance of one week in order to obtain a superseding indictment that would have encompassed all of the charges against petitioner. By so doing, as the district court correctly observed (see page 5, *supra*), petitioner, "in effect, opposed the Government's request for a one-week continuance so that [he] could be tried for both the continuing criminal enterprise count and the conspiracy counts at one time." This deliberate strategy on petitioner's part, which necessitated

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[5]That the government did not in fact seek a CCE indictment in November 1982 is of no consequence. At that time, petitioner had filed an interlocutory appeal from the denial of his motion to dismiss the 1982 substantive and conspiracy charges on double jeopardy grounds. Because a CCE charge would also have been prohibited if petitioner had prevailed on his conspiracy argument (see Pet. App. A7-A8; Tr. 205-208), "the Government was relying on the resolution of the interlocutory appeal" before proceeding on a CCE indictment, and this decision was "not only reasonable but responsible" (see page 5, *supra*).

the separate indictment that is now being challenged and which was plainly calculated to create the present double jeopardy claim, constituted a waiver of his double jeopardy right against successive prosecutions.

Thus, not only did "[t]he government act[] with due diligence in discovering evidence" to support the CCE charge, but it also "was delayed in instituting the charge by [petitioner's] own actions" (Pet. App. A8). The Double Jeopardy Clause does not protect against successive prosecutions that are made necessary by the defendant's "actions [that] prevented the government from trying the * * * charges together" rather than by "prosecutorial or judicial overreaching" (Pet. App. A8). See *Ohio* v. *Johnson*, No. 83-904 (June 11, 1984); *Jeffers* v. *United States*, 432 U.S. at 151-154 (plurality opinion). Any other conclusion would be an affront to fundamental notions of justice and a perversion of the salutary protective purposes of the Double Jeopardy Clause.

3. Relying on *United States* v. *Raddatz*, 447 U.S. 667 (1980), petitioner also objects (Pet. 13-16) that the courts below erred in holding that he was not entitled to a full evidentiary hearing on his double jeopardy claim. *Raddatz*, however, concerned the wholly different issue of the authority of a district court to review the determinations of a magistrate who had conducted an evidentiary proceeding; it did not address the distinct question whether the decisionmaker is required to hold a hearing in the first instance.

Here, the district court had not only been involved in this case but had also presided over two trials of petitioner's co-conspirators, and therefore it was, as the court of appeals concluded (Pet. App. A7), "intimately familiar" with the relevant background and evidence. Based on that familiarity, the district court made the determination,

affirmed by the court of appeals, that there were no disputed issues of fact material to the disposition of petitioner's motion to dismiss. That fact-bound conclusion, concurred in by both lower courts, does not warrant this Court's review. And while challenging the evidentiary basis for the "due diligence" ruling, petitioner even now has failed to point to any material factual issues bearing on the district court's alternative holding, which is sufficient to sustain the judgment below, that he waived his double jeopardy claim by opposing the government's request for a brief continuance that would have allowed all of the charges to be resolved in one proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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